

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Access Charge Reform |) | |
| |) | CC Docket No. 96-262 |
| Reform of Access Charges Imposed by |) | |
| Competitive Local Exchange Carriers |) | |

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

TDS Metrocom, Inc. (TDS Metrocom or Metrocom), by its attorneys, submits this reply to respond to oppositions to its June 20, 2001 petition seeking reconsideration and modification of the Commission's decision on CLEC access charge benchmarks and mandatory tariffing in the above-captioned proceeding.¹ TDS Metrocom is a facilities-based Competitive Local Exchange Carrier (CLEC) focusing on providing competitive voice and data services to residential and business customers in small and medium sized markets in Illinois, Michigan and Wisconsin. TDS Metrocom is unusual among CLECs because it not only targets small and medium sized markets, but also provides a significant proportion of its lines to residential customers. Currently, out of its 90,000 lines, over 35,000 are residential; of about 7,000 loops added monthly, about 4,000 are residential loops provided on unbundled loops, not using UNE-P.

TDS Metrocom demonstrated in its Petition for Reconsideration and its June 28, 2001 Petition for Stay of the Order that the Commission had failed to consider its proposal for additional benchmarks in Tier 2 and 3 and residential markets. These smaller markets and residential customers that Metrocom targets represent areas where inherent limitations on scale

¹ In the Matter of Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) (Order).

economies translate to higher costs not only for Metrocom, but also for the enormous, urban-centered Bell Operating Companies (BOCs), with which Metrocom competes. TDS Metrocom explained that the BOCs' statewide averaged access charges use their lower costs of service in the state's densest urban markets to support below-cost service to these higher-cost market segments. In contrast, to bring competition to the less profitable markets Metrocom is willing to serve, Metrocom must compete without the ability to offset its higher access costs with revenues from the dense low-cost markets that control the ILEC's lower access charges. Loading more costs onto end users and negotiating compensatory access contracts are not real-life alternatives, as Metrocom explained². Consequently, mandatory detariffing above below-ILEC-cost benchmarks for the Tier 2 and 3 and residential markets Metrocom targets imperils the Commission's mission of encouraging competition and providing choices in all markets and for all customers.

Metrocom will focus its reply on the AT&T, Worldcom and Sprint assaults on TDS Metrocom's density-based benchmarks proposal and request for a fair benchmark and transition for build-outs now in progress to serve new markets. Neither their procedural nor their substantive criticisms provide persuasive support for rejecting benchmark variations to recognize cost differences in Tier 2 and 3 and residential markets.

TDS Metrocom's Non-Core Market Proposal Has Not Received the Consideration and Discussion Required by Law

Worldcom (p. 2)³ tries to brush off TDS Metrocom's fundamental due process right, documented in its petition (pp.6-10), to have its alternative proposal and arguments actually considered by the Commission before it must comply with drastic rate reductions to ILEC-based

² Indeed, Sprint (pp. 10-11) opposes any requirement to negotiate in reliance on the ILEC benchmark default.

³ References to oppositions to reconsideration requests are identified by the acronym of the party and the page of the reference.

rates. According to Worldcom, there is “no need” for the Commission to follow legal requirements and consider Metrocom’s proposal because “CLEC costs ... are not relevant” in evaluating their access charges. AT&T and Sprint also contend that CLEC costs are irrelevant to the appropriate level for their access charges, although they also fault TDS Metrocom for not providing sufficient cost data. But it is the IXCs' myopic focus on CLEC costs that is not relevant as an excuse for denying Metrocom reasoned decision making by the Commission.

It is correct that Metrocom demonstrated that the Commission has not made the findings necessary to effectively prescribe rates for CLECs whose rates, like Metrocom’s, are not unreasonable. It is also true that Metrocom has proposed letting CLECs cost justify their access charges to state Commissions, as another indication that many CLECs’ rates are legal by traditional as well as “market-based” criteria. However, the TDS Metrocom proposal the Commission misplaced and failed to consider does not require a showing of Metrocom’s costs to warrant the due process the Commission owes to parties in its rulemaking proceedings. Metrocom asked the Commission to waive or stay application of benchmarks based on statewide average BOC rates because the Commission has yet to evaluate sufficiently the showing that benchmarks in small, medium-sized and residential markets should reflect differences in the competing ILECs’ costs in their dense urban core markets and their significantly less-dense market segments where Metrocom competes. Metrocom’s proposal rests on a strong, unbiased factual predicate demonstrating the difference in relative costs within BOC markets: The proposal to reflect differences in ILECs’ own costs in lower tier and residential markets relies on existing density-based differentials supported by the BOCs themselves. The BOCs are plainly the carriers with access to cost data showing how the costs in less dense portions of their statewide markets exceed the statewide averaged costs presumed by the averaged access charges

the Commission prescribed as benchmarks for all but a handful of very rural companies. Metrocom directed the Commission's attention to already-established public sources of information about the cost differences in different BOC density zones, specifically "section 51.507(f) deaveraged UNE zones, BOCs' "density pricing zones" for switched and special access transport, or other available density-based zones for the ILEC's market." Because it temporarily lost the TDS filing, the Commission was handicapped in evaluating cost variations and prescribing benchmark levels. Thus, Worldcom's claim that the Commission has already decided to limit the rural exemption collides squarely with the law governing administrative fairness that requires consideration of parties filings well beyond what the Commission has provided to the TDS Metrocom proposal and rationale. Worldcom has not given the Commission any cognizable legal excuse for refusing to waive or stay and reconsider applying to Metrocom its one-size-fits-all statewide averaged BOC-based benchmarks shown to be fatally flawed for lower density portions of the BOCs' markets.⁴

The Commission's Prevailing Market Rate Approach Does Not Justify a Single Averaged Benchmark for CLECs in All But the Most Rural Markets

All three of the major IXCs argue that TDS Metrocom's proposal for additional benchmarks for portions of the ILEC's service area with differing costs conflicts with the Commission's decision to limit CLEC access charges to rates set by the marketplace. Sprint (p. 10) contends that CLECs cannot expect to recover costs above "the prevailing market price," dismissing as "uneconomic entry" any effort to set CLEC rates above the competing ILEC's statewide rates. AT&T (p. 13) heats up the rhetoric, branding the Metrocom proposal as "just the sort of proliferating array of artificial subsidies that the Commission was trying to avoid" in benchmarking CLEC access charges. In its view, benchmarks allowing higher rates in

⁴ TDS Metrocom believes that the cost differentials can best be used to identify comparable NECA members and

residential, Tier 2 and 3 markets will “expand and perpetuate indefinitely the uneconomic CLEC access rates and the inefficient market entry that such incorrect market signals produce.”

Worldcom asserts (p. 2) that CLECs are fully compensated at the only level consistent with legitimate competitive entry as long as “they can receive revenues from IXC’s equivalent to what their primary competitors would receive.”

The regulatory and market facts that all of these conclusory assertions ignore are (1) that even the statewide averaged ILEC charges of the BOCs with which Metrocom competes are not “prevailing market rates” and (2) that CLECs cannot recover costs of serving less dense markets and obtain revenues “equivalent to what their primary competitors receive” when they lack the densely populated, low-cost, high-volume urban core markets that enable a BOC or large ILEC to recover more than its service costs in revenues its low-cost markets to offset the ILEC’s higher costs in the residential and lower tier markets targeted by Metrocom.

The price cap companies’ rates are not the prevailing market price. Their rates have not been tied to their costs since price caps took effect. The CALLS plan resulted in negotiated access rates and revenue flows that cannot be simplistically presumed to coincide with their statewide or individual market costs. As long as statewide (and, in some cases, multi-state nationwide) access averaging prevails, the largest ILECs cannot charge market-set rates that reflect differences in cost between their urban core markets and their Tier 2 and 3 and residential market segments. What TDS Metrocom’s proposal seeks is a disaggregation of the averaged ILEC benchmark and of a comparable NECA rate to resemble more closely the rate differentials that a truly market-driven system would bring about.

tariffs for comparable markets.

AT&T argues (p14) that the BTI decision⁵ establishes the market for access services (i.e., what the ILEC charges) rather than CLECs' costs as the controlling standard in determining whether CLEC rates are reasonable. However, BTI expressly sought to discover what rates a carrier "would have charged had the access market been truly competitive," just what the Metrocom plan seeks, and uses comparable NECA rates. The Commission there distinguished its earlier decisions refusing to hold a CLEC's rates unreasonable "solely because they exceeded the rates charged by the competing LECs" and held BTI's rates unreasonable. Yet, the "per se requirement that CLEC access rates never exceed ILEC access rates" disclaimed in BTI is precisely what AT&T claims the Commission adopted in the Order. Unlike BTI's access charges, TDS Metrocom's access charges before benchmarking were near the CLEC average (see Order, para. 22) (not near BTI's rates) and comparable to NECA rates for carriers serving similar markets on a stand-alone basis. Both are criteria used to find the BTI rates unreasonable; both show that Metrocom's rates are reasonable. Contrary to AT&T's assumption that disaggregated benchmarks amount to subsidies, it is the BOCs' urban core markets that are subsidizing their less dense areas.⁶ That is precisely the unwarranted obstacle to competition by CLECs that seek to compete in the non-principle BOC markets that Metrocom's proposal for more benchmarks seeks to remove. Thus, AT&T's insistence that market-specific benchmarks will encourage "inefficient market entry" has the facts exactly backwards. The failure to permit CLECs to tariff access charges appropriate to higher cost portions of the BOCs' areas discourages efficient CLEC market entry and impedes the statutory goal of fostering nationwide competition and consumer choice.

⁵ AT&T Corp. v. Business Telecom, Inc.; Sprint Communications Company v. Business Telecom, Inc., FCC 01-185, EB-01-MD-001, EB-01-MD-002 (rel. May 30, 2001) (BTI).

⁶ AT&T has argued inconsistently elsewhere that such implicit subsidies are an obstacle to competition in the subsidized areas. See AT&T et al., Rural Choice Plan in ex parte dated July 25, 2001, slides 4-5. [cite AT&T MAG

AT&T (p. 11), echoed by Sprint (pp. 7-8) strongly opposes efforts to expand the rural exemption to cover CLECs unless they compete with “a non-rural ILEC that averages its switched access rates across state-side study areas including both high-cost rural areas and lower cost urban areas.” AT&T advocates (p. 12) limiting the rural benchmark to CLECs that would face hardship

if they were required to charge no more than an ILEC rate that is below the cost of serving the rural area because it is based on state-wide averaging of high-cost rural areas with lower cost urban and suburban areas.

The IXC's refuse to see that the identical problem confronts CLECs doomed to serve lower-tier and residential areas at benchmark prices distorted by statewide averaged BOC rates. Indeed, the strained logic required to oppose adding benchmarks for the Metrocom markets while demanding strict application of the averaging purpose underlying the rural exemption has led AT&T to recast the Commission's concern in adopting the rural exemption. Thus, AT&T's self-serving version (pp. 3, 11, 12) transforms the Commission's stated “intent”

to permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers,

(order, para. 88) into the different problem of averaging less dense markets with “lower cost urban and suburban areas.” As carriers that serve many residential and suburban customers, both Metrocom and AT&T are well aware that the “concentrated , urban areas” the Commission references support below-cost rates in residential and suburban markets and smaller cities. Thus, the IXC's' arguments against extending NECA rate-based benchmarks to additional rural CLECs provide compelling, if unintended, support for why the cost differences in residential and lower

tier markets also require relief from cost, rate and benchmark averaging governed by the ILECs' densest urban core costs.

Benchmarks Suitable to Small, Medium-Sized and Residential Markets – Or at Least Transitional Declining Benchmarks -- Should Apply in New Markets

Sprint (pp. 3-6) and AT&T (pp. 4-10) strenuously oppose the requests of Metrocom and others for relief from the Commission's "flash cut" to the ILEC-based benchmark for service to any new market where customer service has not been introduced. Sprint argues that CLECs should have known that rates higher than the competing ILECs' rates were unlikely to survive Commission review of CLEC access charges. However, the Commission statements it points to (pp. 4-5) are ambiguous, at best. They pale in the face of the Commission's admitted (Order, para. 37) that simply exceeding the ILEC's rates does not indicate that a CLEC's rates were unreasonable, which the Commission reaffirmed in BCI.⁷ Investments in expansion made under this Commission policy deserve a fair transition just as existing investments do.⁸

AT&T goes beyond the question of adequate notice for the new market flash cut to claim that even extending the transition to ILEC-based benchmarks to new markets would swell existing CLEC "subsidies" and encourage more inefficient entry decisions. If carriers have already invested in serving markets under previous Commission policies, there is no less unfairness and disruption from imposing a flash cut on markets undergoing expansion than where service is underway. Nor will a rational CLEC rush to enter more markets, where it will not be able to recover its costs, because the lowest benchmark level is 3 years away. Metrocom has put expansion on hold because of the Order into Tier 2 and 3 and residential markets where customers will now be deprived of Metrocom's competition.

⁷ BCI, para. 26.

⁸ AT&T's notion that CLECs should race the clock to serve customers to earn a 3-year transition at inadequate rates to even more inadequate rates is not a serious proposal for dealing with legitimate CLEC regulatory

Benchmarks above the ILEC's averaged statewide (and, in some cases, multi-state regionwide) rates are necessary to support economic competition in new markets. For new and existing markets, the "prevailing market rate which a new entrant would have to meet if the market for access services were a competitive market," the criterion AT&T (p. 5) and Sprint (p. 10) support, would not be the statewide or regionwide average of the ILEC's rates for those markets and its core urban markets. AT&T's "artificial subsidy" presumption is unjustified because it incorrectly assumes that BOC rates for these markets are not subsidized. The Commission should apply the same reasoning (Order, para. 76) it used to reject AT&T's notion that any differing rural benchmark is an unlawful implicit subsidy of the CLEC. As the Commission correctly analyzed AT&T's argument,

the exemption we adopt today is not properly viewed as an implicit subsidy of rural CLEC operations. Instead, it merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas.

Here, too, the IXCs seek to impose the ILEC's below-cost smaller market costs on CLECs, knowing that the CLECs do not have urban markets to price above costs as the BOCs do. The Commission should again recognize that the IXCs are simply seeking to claim the benefit of non-rural rate averaging at the expense of CLECs who cannot support a subsidy from lower cost markets they do not serve. Therefore, the Commission should waive or stay its faulty benchmark prescription for Metrocom until it acts on Metrocom's proposal, adopt that plan to tailor additional benchmarks to accommodate differences in cost in residential and lower tier ILEC markets and apply these adjusted market-price benchmarks to existing and new CLEC markets alike.

Conclusion

The IXC's have not made their case against the TDS Metrocom proposal for additional benchmarks to reflect significant cost differences in core urban, Tier 2, Tier 3 and residential markets within the ILEC's statewide averaged access charges, let alone that the Commission need not even consider the plan. Benchmarks that comport with density-based cost differences in ILEC service areas are necessary to preserve the ability of Metrocom and CLECs that compete in markets outside the most profitable, lowest cost urban cores of the BOC markets are essential to enable carriers to target consumers in these markets. The only beneficiaries of refusing to add benchmarks to accommodate real differences in ILEC and CLEC cost characteristics are the IXCs; customers in lower tier and residential markets and the CLECs trying to serve them are the losers.

Respectfully submitted,

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